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The Potential Big Impact of Trump's Clean Water Rollback

Under the Trump administration seasonal streams and wetlands might not be protected. That could pollute waters near you.

An old pond became a new channel of the St. Vrain River during floods in 2013 near Lyons, Colorado.
PHOTOGRAPH BY MATT NAGER

By **Hillary Rosner**

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COLORADO—The Cathy Fromme Prairie, in the southwestern corner of Fort Collins, Colorado, is a window to the past—a remnant of the shortgrass prairie that once covered this region. The wetlands and meadows here host creatures winged, furry, and scaled: songbirds, eagles, rabbits, coyotes, rattlesnakes. A stream called Fossil Creek wends its way across the prairie before snaking through nearby subdivisions, strip malls, and a golf course. People in the area know its name: There's Fossil Creek Parkway, Fossil Creek condos, Fossil Creek Park.

On a warm and windy March morning on the Cathy Fromme, Fossil Creek isn't much to look at. It's just a dry, shallow channel a few hundred yards from a parking area. In fact, Fossil Creek is dry for most of the year.

But when water flows—mainly after big rains—it helps soak wetlands that are vital for filtering water and harboring migratory birds and other animals. It feeds aquatic bugs that form the base of many food chains. And ultimately, after passing through the golf course, it fills Fossil Reservoir and empties into Cache La Poudre river, which irrigates countless farms and provides drinking water to hundreds of thousands of residents across the boomtowns of Colorado's Front Range.

Does the federal government have the authority to protect Fossil Creek under the Clean Water Act? The Obama Administration thought so. The Trump Administration does not.

Roughly 90 percent of the streams that twist across the American West are, like Fossil Creek, ephemeral. Under an Obama Administration rule that has been held up in court, those streams could be protected insofar as they merge downstream with larger waterways. The rule would also protect some wetlands and isolated lakes.

The Environmental Protection Agency based the rule on a 400-page scientific report that synthesized 1,200 peer-reviewed articles. "There's close to a scientific consensus on this issue," says Brian Chaffin, a water policy professor at the University of Montana. "Protecting our waters really depends on the quality of tributaries," says David Cooper, a wetland ecologist at Colorado State University.

But a new executive order issued by President Trump directs the EPA and the U.S. Army Corps of Engineers to replace the rule with one based, not on hydrology, biology, or chemistry, but on a narrow interpretation of the Clean Water Act put forward a decade ago by then-Supreme Court Justice Antonin Scalia.

Under that interpretation, streams like Fossil Creek "could be put into a culvert, paved over, filled in," Cooper says.

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MURKY WATERS

Water law is a complex beast, and throughout the Clean Water Act's nearly 45-year history, the question of which water it actually applies to has always been controversial.

The law itself states that it governs "navigable waters," which it defines vaguely as "waters of the United States." A definition that really isn't one gives "an inkling that Congress knew that 'navigable waters,' which we think of as big, where the ports are and the barges go, wasn't going to be enough," says Melinda Kassen, a water lawyer in Colorado with the Theodore Roosevelt Conservation Partnership.

A few years after the law was passed (overriding President Nixon's last-minute veto), the EPA and the Army Corps issued a regulation defining waters of the U.S. in what Kassen calls "a really, really broad way." It protected many types of streams and wetlands—and it remained in place for the next 25 years.

But things changed in 2001, with a Supreme Court case known as SWANCC (pronounced "swank"), after the Solid Waste Agency of Northern Cook County. It had sued the Army Corps for denying a permit to turn a former gravel-mining pit into a landfill. Over the years, the pit had filled with water and become a stopover for migrating birds.

The court said the Corps had overreached, and that the Clean Water Act didn't cover "isolated waters." Rather, there had to be a "significant nexus" to navigable waterways.

But "significant nexus" isn't exactly precise. And in the decision's wake, there was even greater general confusion about what the law did and didn't cover.

Around the country, Army Corps offices took wildly different approaches to what they regulated. Did a prairie pothole have a significant nexus? Did a playa? An ephemeral stream?

Then, in 2006, came another Supreme Court case: Rapanos v. United States, the climax of a decades-long legal battle sparked by a mall developer who filled in a wetland, claiming it was too far from navigable water to matter. He was convicted on two felony counts.

Rapanos ended without a majority decision: Four justices voted to keep the Clean Water Act interpretation as it stood—the vague "significant nexus" standard—and five voted that it needed amending. But of those five, only four could agree on why and how. The decision wasn't 5-4 but 4-1-4. Scalia wrote the "plurality" opinion, arguing that Congress never intended the Clean Water Act to apply to wetlands. Only those that have "a continuous surface connection" to "relatively permanent, standing, or flowing" waters should be covered.

Justice Anthony Kennedy agreed that the case should be returned to the lower court to determine if the waters in question were covered—but he vehemently disagreed with Scalia's reasoning. The significant nexus idea was sound, he said, agreeing with the four dissenters; it should be defined as covering anything that affected the "chemical, physical, and biological integrity" of navigable waters.

"Kennedy carried forward U.S. Supreme Court precedent," says Michelle Bryan, a natural resource law professor at the University of Montana. "Scalia tried to change the law but he was unsuccessful." For now, the "significant nexus" remains in place—but it's not still clear what it means.

ENTER OBAMA

The Obama administration wanted to clarify things once and for all. In 2014, based on a massive scientific review process and roughly 2 million public comments, the EPA issued the Clean Water Rule. According to the agency, it was designed to ensure that "waters protected under the Clean Water Act are more precisely defined, more predictable, easier for businesses and industry to understand, and consistent with the law and the latest science." The rule, the agency said, "protects streams and wetlands that are scientifically shown to have the greatest impact on downstream water quality and form the foundation of our nation's water resources."

The rule protected tributaries that contain "a bed, bank, and ordinary high water mark" as well as "regional water treasures" such as prairie potholes and Texas coastal wetlands "when they impact downstream waters."

It explicitly did not cover most farm ditches. Nor did it extend to most farm-related activities like plowing fields or moving livestock.

But the rule was immediately challenged in court and put on hold.

The American Farm Bureau argued that the agencies would now have "almost unlimited authority to regulate" wetlands, ditches, and "any low spot where rainwater collects." Members of the Missouri Farm Bureau produced a parody video, in which a farm wife walks barefoot through a dry ditch—while her husband and three young kids pretend to boat and swim in the dusty channel—singing a ballad with lines like, "Don't need no government anyway."

Some state farm organizations supported the rule, however. The Rocky Mountain Farmers Union launched its own "They Don't Speak for Me" campaign, asserting that farmers and ranchers also need clean water and that the most vocal objections were the work of DC lobbyists.

In the meantime, a 2008 guidance document issued by the Bush Administration—meant as a temporary stop-gap—remains the guide to what's covered by the Clean Water Act and what's not. "Guidance documents don't have the force of law," Kassen says. "Everyone agrees it's not a good way to be operating."

WAITING FOR CLARITY

Peschel Open Space, on the eastern edge of Longmont, Colorado, is a perfect spot to understand the difference between Scalia and Kennedy. Here, on one side of a dirt road, the St. Vrain Creek flows by, its channel braided from where it jumped its bank during a huge flood in 2013. The St. Vrain would likely be protected even under Scalia's test, as it flows year-round and directly connects with the South Platte River.

But across the dirt road—roughly one SUV length away—is a wetland. It helps filter pollution from surrounding urban and industrial areas and farms. On a March morning so windy that you could barely open a car door, huge clouds of dirt blew across the wetland from a bare farm field across the road.

"Pollution rolls downhill, and it will go downhill without wetlands to filter it," said Alison Holleran, executive director of Audubon Rockies, waiting out the wind in her car.

Under a Scalia interpretation, this wetland would certainly be exempt from the Clean Water Act, because the narrow road acts as a surface barrier between it and the creek—the two do not have "a continuous surface connection."

In Colorado, there are roughly 95,000 miles of streams, but only about 15 miles of those are truly navigable. In an extremely narrow reading of the Clean Water Act, much of the state's water—and thus the water of every state downstream of Colorado—could be at risk from pollution.

So what happens now? Even if the EPA under Scott Pruitt—an adamant opponent of the Obama-era rule—issues a new rule in the quickest possible manner, with the shortest required public comment period, the lawsuits will come almost immediately. "If they apply the Scalia test, or just say it's only the navigable waters and nothing else," says Bryan, "then we are going to have litigation of breathtaking proportion."

It will almost certainly end up, once again, in the Supreme Court.

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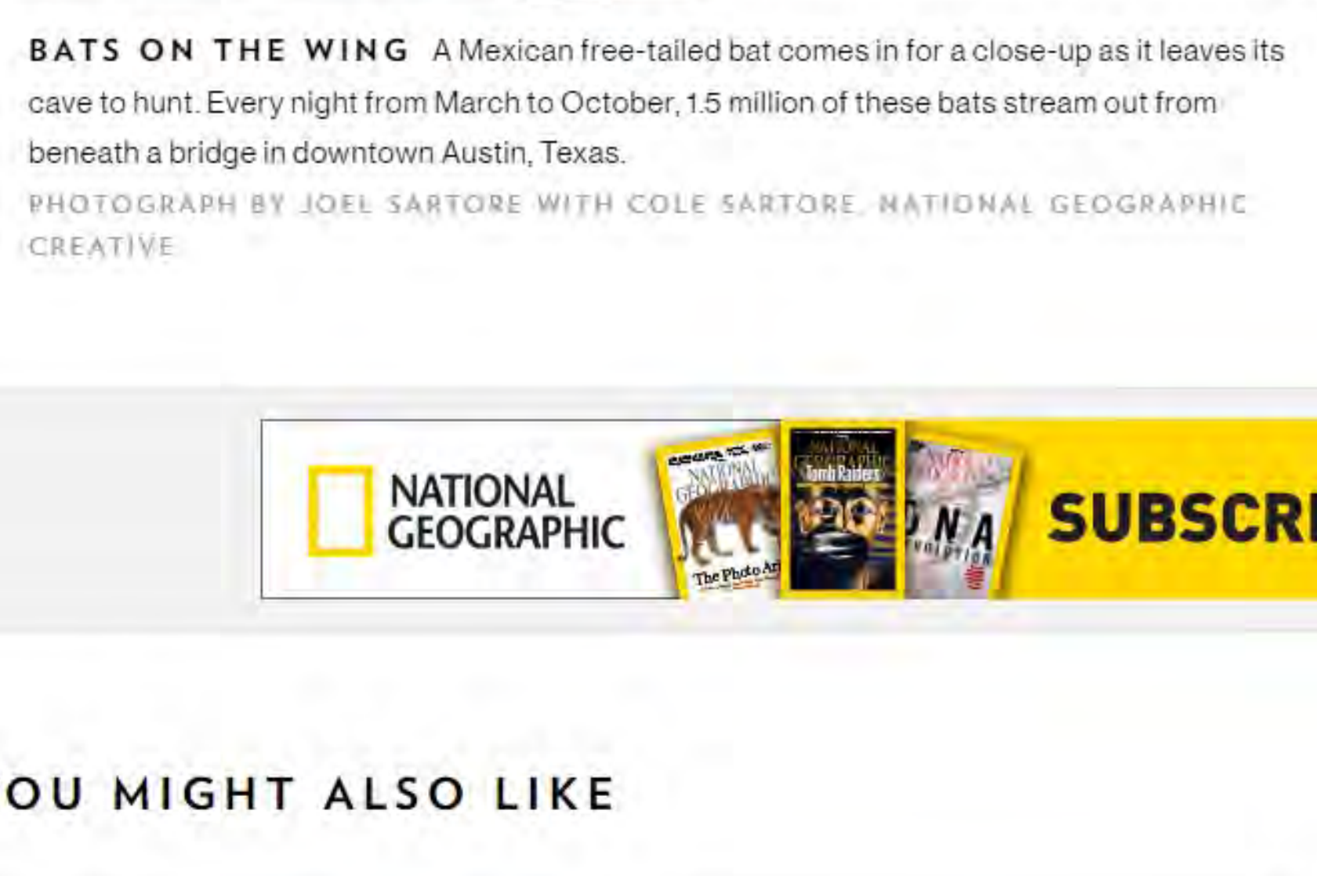

BATS ON THE WING A Mexican free-tailed bat comes in for a close-up as it leaves its cave to hunt. Every night from March to October, 1.5 million of these bats stream out from beneath a bridge in downtown Austin, Texas.
PHOTOGRAPH BY JOEL SARTORE WITH COLE SARTORE, NATIONAL GEOGRAPHIC CREATIVE

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